

ISLAM, MUSLIMS, AND RELIGIOUS FREEDOM IN EUROPE: A TEST OF FAITH

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Introduction

The Muslim presence in Europe signals a substantial cultural change for Western societies that are now coming to terms with a permanent, visible Muslim population. Considering the tumultuous history between the Islamic world and Europe, the reality of European Muslim communities represents an important point of inflection. In the past, conversations were framed as *Islam versus the West*, but that has transformed into *Islam in the West*, and as we move from first- and second-generation immigrants to native-born Muslims, the conversation will shift focus to the *Islam of Europe*, if not an emerging European Islam.

Historically in Europe, religion and its derivatives played a crucial role in the process of secularization and in achieving the right to religious freedom. Thanks to this specificity, and to the definition of the boundaries of religious expression within a secular society, the right to religious freedom came to exist.²⁰¹ It has thus been able to separate, or at least differentiate, European states from their religious institutions, while ensuring the primacy of the former over the latter. Islam in Europe is taking root within this legal tradition, with consequences that transcend European borders and influence strategies for differentiation between religious and secular. As a result, European secularism has secured the religious freedom of Muslims but conditions their relationship with states of origin by making the religious legal model built in the aftermath of the treaties of Westphalia in 1648²⁰² both a common paradigm and a status quo. In other words, by

interrupting the current modern religious freedom paradigm, the presence of Muslims in Europe has ignited a debate on the exact nature of religious freedom within Europe's societal model, which was previously thought to have been settled.

The presence of Muslims in Europe and the development of Muslim community networks shattered the rigidities of the "implicit norms"²⁰³ of the Westphalian model. However, European law regarding religious freedom struggles to incorporate both individual manifestations and the unique structure of transnational Muslim communities. The crisis of the European right of religious freedom in the face of Islam is the consequence of its exercise—or of the demand for exercise—by individuals and groups who are members of a religion or culture that did not participate in the religious peace process of 1648 and the constitutional initiative of the post-World War II world today. This calls into question the purported universalist automatism of the political paradigm that has governed Europe to date²⁰⁴

To illustrate the dynamics of European law on religious freedom regarding Islam, consider the classical distinction between the modern state-centric model of the right to religious freedom and the contemporary individual-centric model of the same right, having been developed through post-World War II constitutionalism in order to conform national legal systems to international human rights law.²⁰⁵ This essential distinction shows how the treatment of Muslims in Europe exposes the inevitable hybrid nature of European law to religious freedom (both modern and contemporary), which reveals tensions and defines religious freedom as an absolute personal and community right guaranteed by and for a plural political community.

201 Philippe Portier, "State Regulation of Religion in Western European Countries" in *Politics of Religion in Western Europe: Modernities in Conflict?*, ed. François Foret and Xavier Itçaina (Milton Park, Abingdon, Oxon: Routledge, 2011), 93-107.

202 The treaties of Westphalia helped establish the foundation of the modern day state in Europe. The treaties, which took four years of negotiation, brought an end to two major wars: the 30-year Roman Empire war (1618-1648) and the 80-year Dutch-Spanish war (1568-1648); Derek Croxton, "The Peace of Westphalia of 1648 and the Origins of Sovereignty," *The International History Review* 21, no. 3 (1999), 569-591.

203 Richard Mohr, "The Christian Origins of Secularism and the Rule of Law," in *Law and Religion in Public Life. The Contemporary Debate*, ed. Nadirsyah Hosen and Richard Mohr (London-New York: Routledge, 2011), 34-51.

204 Sarah Carol and Ruud Koopmans, "Dynamics of Contestation over Islamic Religious Rights in Western Europe," *Ethnicities* 13, no. 2 (2013), 165-190.

205 Monika Wohlrab-Sahr and Marian Burchardt, "Multiple Secularities: Toward a Cultural Sociology of Secular Modernities," *Comparative Sociology* 11, no. 6 (2012), 875-909.

Navigating through the Processes of Secularization, *Laïcité*,²⁰⁶ and the Traditional European State-Church Models

Before the arrival of Muslim immigrants, the old systems of state-church relations were being pushed aside by the rise of secularism. The arrival of new Muslim immigrants, however, reactivated the old framework by those seeking to use it as an instrument of public security and for the perceived defense and elevation of the role of churches in Europe, if only from a cultural lens.²⁰⁷ This process can be broken down into three successive phases in the relationship between Europe and Islam in the post-World War II era.

In the first phase, which lasted into the 1970s, Muslims in Europe were described as a “non-ethnic religious minority.”²⁰⁸ They were primarily immigrant workers whose right to religious freedom was irrelevant to the management of their presence.²⁰⁹ In the second phase, which lasted until the 1980s, immigrants were seen primarily as Muslims (as opposed to being connected to their country of origin) and were increasingly seen through the European lens of religious freedom. The third phase, which continues to this day, was triggered when Muslims were perceived as a threat to Europe, and the right to religious freedom became increasingly used as a policing tool to enforce social cohesion and the security of nation-states. Although Muslims do benefit from European laws protecting religious freedom, this has not put an end to the debate around the place of Muslims in Europe. Rather, it has brought it to a head, as religious demands emanating from Muslims are shared by Europeans of other faith traditions. Muslim demands have shifted from that of a specific right to a more global desire for active citizenship, which aims to integrate the Muslim cultural and religious identity of new Europeans into the public sphere.

In the wake of calls for religious freedom for Muslims, the various statuses recognized for traditional churches

and extended to Muslims have found a new political relevance. However, achieving the goal of integration through the right of religious freedom requires Muslim community institutions and leaders to explicitly adhere to the most symbolic values and principles of contemporary constitutional and liberal democracies: secularism, human rights, nondiscrimination, gender equality, gender diversity, and the French notion of “living together,”²¹⁰ used by the European Court of Human Rights (ECtHR) in Strasbourg in *S.A.S v. France*²¹¹ to uphold the law banning the full-face covering in public.

This is an important transformation if one compares this requirement with those of the liberal modernity in the nineteenth century. The latter demanded that churches respect only the main normative implications of the values enshrined by the states. Secular states certainly fought the ideological dogmas put forward by religions, in particular Catholic dogmas, but without seeking to challenge their specifically religious legitimacy. Today, on the contrary, the enjoyment of a right to genuine religious freedom requires adherence, loyalty, and sometimes even religious sanction of mainstream societal gains and the transformation of religious groups into constitutional religions, if not civil religions.

With regard to Muslims, this approach is usually justified by two apparently simple pieces of data, both quantitative and temporal: Muslims are too numerous and are too recent to ask for exemptions from current understandings of religious freedom, including such things as minaret and hijab bans. However, the fear of excesses linked to the supposed slippery slope argument of abuses of reasonable religious accommodation betrays an essentialist vision of Islam and Muslims. It transforms the right to religious freedom into a guarantee to preserve the place of the majority as well as an instrument of assimilation. Religious freedom would be no more than a simple stage, which, by separating and attempting to laicize the different religions, would

206 We understand the concept of *laïcité* as used in France as the “rejection of the political role of religion and as an obligation of the state to be indifferent toward religion.” Rim-Sarah Alouane, “Freedom of Religion and the Transformation of Public Order in France,” *The Review of Faith and International Affairs* 13, no. 1 (2015).

207 Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford: Oxford University Press, 2010).

208 Maleiha Malik, “Progressive Multiculturalism: The British Experience” in *European Multiculturalism Revisited*, ed. Alessandro Sijj (Zed Books, 2010), 52.

209 Rim-Sarah Alouane, “Re-evaluating *Laïcité* in Light of France’s Historical Treatment of Muslims,” *Ethnicities* (2015), 6.

210 Living together is a French principle that vaguely defines citizens’ open interpersonal relationships derived from the French resolution of “*fraternité*.” This concept was used by the French government to ban the veil in France, and in 2014, the European Court of Human Rights accepted it. See Alexandria Weller, “The Future of ‘Living Together’: An Analysis of the European Court of Human Rights’ *S.A.S v. France*,” *North Carolina Journal of International Law* 41, <https://www.law.unc.edu/journals/ncilj/issues/volume41/the-forum/-----the-future-of-living-together-an-analysis-of-the-european-court-of-human-rightss-sas-vfrance/>, 105.

211 *S.A.S v. France*, 43835/11, July 1, 2014. For further developments, see Erica Howard, “*S.A.S v. France*: Living Together or Increased Social Division?” *EJIL: Talk!*, July 7, 2014, <https://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/>; Osmanoğlu & Kocabaş v. Switzerland, 29086/12, January 10, 2017, \$98 & \$100.

tend to secularize them and reduce their impact within a homogeneous civil society.

This project, supported by strong state interventionism, involves the creation of a compliant clerical leadership and the definition of forms, structures, and contents of a compliant “European Islam.” In this sense, the Austrian Islam Law of 2015,²¹² the agreement of the Danish political parties against religious preachers of May 2016,²¹³ and, in general, the efforts made throughout Europe for the training of Muslim religious leaders or the opening or management of mosques, among other examples, basically renew the practices of the old jurisdictionalism and the tradition of national churches. This means that, to obtain full citizenship in the European context, Muslims must first metabolize the acquired rights of modern secularization and register their individual and associative religious demands within the framework of ecclesial organizations representing a type of religiosity seen as nonthreatening by the state. Using this process of the domestication of religion, the European right to religious freedom has been able to organize a space that keeps religions away from the political arena. Today, the domestication of religion is still justified by its proponents as necessary for the management of a plural society, albeit with strong autonomy at all levels. Thus, religious freedom is no longer a system governing an individual’s right to worship as they choose, but rather a box in which religious institutions and expressions are firewalled from governing structures.

The issue of the integration of Muslims and Islam in Europe has revealed the political character of the right to religious freedom and brought to light the political and polysemous character of state deliberations and individual behavior. It does so by highlighting the

tensions between the security and authority needs of the state and the human rights needs of individuals.²¹⁴

Finding a Place for Islam in Europe

These tensions and challenges highlight Europe’s difficulty in accepting the multidirectional nature of globalization, as nation-states react by instituting policies dedicated to protecting and defending borders in both a security and culture context. It is with this perspective that one must consider the precautions imposed on the Treaty on the Functioning of the European Union, which “as amended by the Lisbon Treaty gave considerably more weight to the principles of subsidiarity, proportionality, and national identity,”²¹⁵ as well as the position of the European Commission that considers that only religious and nondenominational groups already recognized at a national level can be part of the dialogue.²¹⁶

This same defensive attitude is even more evident with regard to supranational judicial bodies, in particular the ECtHR. The court’s constant reminder to respect the state’s margin of appreciation²¹⁷—especially in matters of religious freedom—is now a constant, which has been extended to decisions of the Court of Justice of the European Union (CJEU) in Luxembourg, for example, when it ruled in *Achbita v. G4S* on the discriminatory effects of the ban on wearing headscarves in the workplace by a Muslim employee, leading to her dismissal. The CJEU ruled in *Achbita* that “direct discrimination” is not constituted if a firm has an internal rule banning the wearing of any political, philosophical, or religious sign. In so doing, the firm equally limits the manifestation of all beliefs without distinction. In dismissing a claim of direct discrimination, the CJEU underlined that there was no information showing

212 On March 31, 2015, after three years of negotiations, an Austrian law was approved. The Austrian Islam Law defined the rights and obligations of Muslim communities, especially the right to practice Islam, in order to protect their right of being both Muslim and Austrian; Bundesministerium für Europa, *Federal Law on the External Legal Relationships of Islamic Religious Societies*, ERV_2015_1_39, March 31, 2015, https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Integration/Islamgesetz/Islam_Law.pdf.

213 On May 31, 2016, the four political parties in Denmark came to an agreement with the Danish government on establishing a national sanction list that banned religious preachers who undermine Danish laws and values. On December 27, 2016, the Danish Immigration Service published a list with six banned preachers; five of whom were Muslim and one an American Evangelist. See “Entry Ban for Certain Religious Preachers: A New National Sanction List,” *Ny i Danmark*, February 5, 2017, <https://www.nyidanmark.dk/en-GB/News-Front-Page/2017/11/Entry-ban-for-certain-religious-preachers-%E2%80%93-a-new-national-sanction-list>.

214 See, for example, the Burkini Affair: Conseil d’État, Ordinance 402742, 402777, *Ligue des droits de l’homme et autres*. See also Rim-Sarah Alouane, “The French Council of State on the Burkini - Part 2: Upholding Religious Freedom,” Oxford Human Rights Hub, October 18, 2016, <http://ohrh.law.ox.ac.uk/the-french-council-of-state-on-the-burkini-part-2-upholding-religious-freedom/>.

215 Theodore Konstadinides, “The Constitutionalisation of National Identity in EU Law and Its Implications,” *SSRN Electronic Journal* (2013), doi:10.2139/ssrn.2318972.

216 European Ombudsman, “Decision of the European Ombudsman in His Inquiry into Complaint 2097/2011/RA against the European Commission,” Decision on January 25, 2013, §48, <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/49026/html.bookmark>.

217 The margin of appreciation is a doctrine developed by the ECtHR when examining whether a member state has violated the European Convention on Human Rights. It implies that a member state is allowed to a degree of discretion, subjected to ECtHR supervision, when it takes legislative, administrative, or judicial action in the area of a convention right. See further: Andreas Follesdal and Nino Tsereteli, “The Margin of Appreciation in Europe and Beyond,” *The International Journal of Human Rights* 20, no. 8 (2016).

that Ms. Achbita was treated differently than other employees.²¹⁸

The Painful Integration of European Islam: The Driving Force for a Transformation of Secularism and Laïcité?

Despite their resistance, European nation-states are experiencing a profound change in mechanisms of exercising sovereignty, and emerging European Islam is facing weakened state-church models. Contemporary, horizontal, and individual-centered constitutionalism tends to deinstitutionalize the right to religious freedom, moving from religious denominations as external legal orders to the state and religious associations as private expressions of civil society. This same constitutionalism tends to distort the right to religious freedom by absorbing into freedoms of conscience, opinion, and association, and the principles of equality and nondiscrimination.²¹⁹

The private character of modern secularism is used to refer to the separation of religious institutions from the state as well as to their progressive autonomy in strictly theological dimensions. This privatization was based on the awareness of religious otherness and, often, on a perception of religion as being fundamental and backwards in nature. On the contrary, the contemporary privatization of secularism refers to religious organizations incorporated in civil society and recognized as carrying a public interest. This form of “public” privatization erodes the preexisting legal and social consensus with respect to religious exceptions and intrinsically the right to religious freedom itself, increasingly seen as unjustified privileges. Professor and political scientist Olivier Roy notes that religious communities are left with three options:

1) To withdraw into the private sphere for individuals, or to the ‘ghetto’ for communities (Amish, Lubavitch), 2) To acknowledge the divorce and to claim, for mainstream churches, ‘clerical exemptions’ and ‘consciousness objection,’ 3) [To] reformulate religious norms in a way that is acceptable by the secular rationality, in a word, to ‘reform’ religion (a constant call addressed to Islam, but also to the Catholic Church).

The first option is what French laïcité requests. The second is a defensive reaction from faith communities that turns religious freedom into freedom of the Church (religious liberty), or from any specific community requesting the right to be different. The third option is probably the most popular in terms of public opinion, because it explicitly requests religions to reform themselves in order to be in accordance with secular values.²²⁰

As has been said about constitutional religions, recognition of this public role might require additional domestication of religious denominations to ensure that they abide by values shared by much of society. But this recognition underlines the difficulty of accepting religious lifestyles that are perceived as violating human rights. When these religious customs are interpreted in light of a rationality inspired by radical secular partisans, or rather illiberal liberals who become intolerant, they are used against individuals and minority groups under the myth of a state supremacy that is refractory to any form of religious accommodation.²²¹

Conclusion

Both modern and contemporary forms of secularism presuppose the political sovereignty of the state to ensure the effectiveness of rights. On one hand, contemporary secularization strongly erodes the borders of states and religious communities. But it is difficult to imagine both the complete evaporation of legal normativity that has developed in religious autonomous community contexts and a political authority capable of ignoring the religious orientation of these lawmakers. Consequently, it is also difficult to envisage the disappearance of a European right to religious freedom. Thus, the tension between the new horizons drawn by constitutional religions and rights detached from all religious specificity and the legacies of the modern right specific to religious freedom will still mark legal history and politics. While the foundations of the right to religious freedom in Europe have seemingly been set in stone for generations, the ongoing question of Muslims in Europe will play a significant role in defining the right’s future.

218 Court of Justice of the European Union, C-157/15 Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding/G4S Secure Solutions, March 14, 2017, § 30.

219 For instance, the European Union Agency for Fundamental Rights report of 2016 does not refer once to religious freedom, but refers to equality and discrimination on the grounds of religion or belief. See <http://fra.europa.eu/en/publication/2016/fundamental-rights-report-2016>.

220 Olivier Roy, *Rethinking the Place of Religion in European Secularized Societies: The Need for More Open Societies*, Robert Schuman Centre for Advanced Studies, European University Institute, March 2016, http://cadmus.eui.eu/bitstream/handle/1814/40305/RSCAS_Research_Project_Conclusion..pdf?sequence=3&isAllowed=y, 9.

221 Roy, *Rethinking the Place of Religion in European Secularized Societies*.